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IN THE

Supreme Court of the United States

October Term, 1966

No. 333

SEVILLE SYNDICATE INC., MUNDEK MARGULIES, AND CHASKE MORGENSTERN,

Petitioners,

—against—

MORITZ KOZLOWSKI,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

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PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

Petitioners, Seville Syndicate, Inc., Mundek Margulies, and Chaskel Morgenstern, pray that a writ of certiorari issue to review the order of the New York Court of Appeals, rendered the 11th day of April 1967 denying petitioners' application for leave to appeal from the order of the Appellate Division, First Department of the New York Supreme Court rendered November 10, 1966 which unanimously affirmed an order of the New York Supreme Court, New York County, made the 17th day of February, 1966 granting Respondent's motion for summary judgment which required petitioners to specifically perform a contract for the sale of the Hotel Seville which is a multi-million dollar asset, virtually the only asset of Petitioner Seville Syndicate, Inc. The nisi prius court afforded no trial or evidentiary hearing to the Petitioners, thus depriving them of property without due process of law.

Opinion Below

Neither the Court of Appeals nor the Appellate Division of the New York Supreme Court wrote any opinion.

Jurisdiction

The New York Court of Appeals denied leave to Petitioners to appeal on the 11th day of April 1967, without opinion. The Appellate Division of the New York Supreme Court, First Department, affirmed the order and judgment of the Supreme Court, New York County on the 10th day of November, 1966 and denied leave to appeal to the Court of Appeals on the 17th day of January 1967 without opinion. The order and judgment of the Supreme Court, New York County (per Waltemade, J.) was made on the 17th day of February 1966.

The jurisdiction of this Court is invoked under Title 28 U.S.C. § 1257(3) and rules 19 and 22 of this Court.

Questions Presented for Review

1—WHETHER PETITIONERS' CONSTITUTIONAL RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS WERE VIOLATED WHEN THE NEW YORK SUPREME COURT, NEW YORK COUNTY, ORDERED THEM TO SELL AND DISPOSE OF THE PREMISES KNOWN AS THE HOTEL SEVILLE, VIRTUALLY THE SOLE ASSET OF THE CORPORATE PETITIONER, FOR AN INADEQUATE CONSIDERATION AND WITHOUT AFFORDING PETITIONERS ANY OPPORTUNITY TO CALL OR CROSS EXAMINE WITNESSES, OR TO HAVE A TRIAL?

2—WHETHER THE SUMMARY JUDGMENT OF THE NEW YORK SUPREME COURT, NEW YORK COUNTY, DENYING PETITIONERS A TRIAL, CONSTITUTED A DEPRIVATION OF PROPERTY WITHOUT DUE PROCESS OF LAW UNDER THE 14TH AMENDMENT?

3—WHETHER THE COMPULSORY SALE OF THE SEVILLE HOTEL, WHICH FOISTS A CONTRACT UPON THE INDIVIDUAL PETITIONERS VIOLATES ARTICLE I, SECTION 10 OF THE UNITED STATES CONSTITUTION BY IMPAIRING THE OBLIGATION OF CONTRACT.

4—WHETHER PETITIONERS WERE DENIED EQUAL PROTECTION OF THE LAWS IN VIOLATION OF THE FOURTEENTH AMENDMENT BY THE DENIAL OF A TRIAL ON THE QUESTION OF THE SALE OF THE PROPERTY KNOWN AS THE SEVILLE HOTEL.

Constitutional and Statutory Provisions Involved

The constitutional provisions involved are the due process and equal protection elauses of the 14th Amendment and the 10th section of Article one of the United States Constitution (impairment of the obligation of contract). Pertinent portions of these provisions are reproduced in Appendix A.

Statement of the Case

The petitioners, Mundek Margulies, and Chaskel Morgenstern together with Respondent, Moritz Kozlowski, are the owners of all the stock of the corporate Petitioner, Seville Syndicate, Inc. Kozlowski owns one third of the stock and Margulies and Morgenstern, one third each. The only significant asset owned by the corporate petitioner is the Seville Hotel located at 29th Street and Madison Avenue in New York City.

The Petitioner, Margulies, and Respondent Kozlowski entered into a stockholders' agreement to which the corporate Petitioner was a party on March 22, 1955. The Agreement was to expire on the expiration of ten (10) years. This agreement was amended on June 14, 1956 to include petitioner Morgenstern in its provisions and also included a procedure whereby the main asset of the corporate Petitioner, The Hotel Seville, might be sold. It is important to note that the expiration of the original contract was *not extended* by the amendment of June 14, 1956. [The original contract is annexed hereto marked Exhibit A and the amendment is annexed and marked Exhibit B.] [The letter of offer dated May 28, 1965, over 10 years later is annexed and marked exhibit C.]

The original record which is contained in the record on appeal to the Appellate Division, First Department, a copy of which will be submitted to this court, contains all the essential pleadings, as well as agreements.

What the trial court did without granting a trial was to declare that the contract was entirely different than originally written since it extended its original expiration date beyond the tenth year.

It should be noted that the agreement of March 22, 1955 was not extended so far as termination date was concerned by the June 14, 1956 amendment thereof. It was to terminate in ten years.

There developed certain disagreements between Kozlowski on the one hand and Margulies and Morgenstern on the other. On May 28, 1965 which was *more than ten years* after the March 22, 1955 stockholders' agreement went into effect, Kozlowski found a purchaser who wished to buy the Hotel Seville for $2,000,000. (Bernard Sillins was the prospective purchaser.)*

The petitioners' claims in the Court of Appeals, *inter alia*, were that the contract had terminated and that there was no authority to compel a sale of the hotel and that the offer to purchase was not bona fide. In addition, it was alleged that many provisions were not settled by the alleged purchase contract. Moreover, two thirds of the stockholders, namely the individual petitioners, were strongly opposed to any sale of the hotel and challenged the legality and good faith of the respondent and the prospective purchaser. Petitioners also raised the 14th Amendment.

Above all, the petitioners argued in the courts below that the consideration was inadequate, especially in view of the inflated real estate market and that it was contrary to the wishes of the board of directors.

Notwithstanding all of these challenges, the trial court denied a trial of the issues and granted summary judgment on affidavits alone coupled with the pleadings. The court permitted no evidentiary hearing or trial. The net result was a deprivation of an asset worth over $2,000,000 without a trial.

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* The contract of sale is an exhibit attached to the complaint. See record on appeal.

It is of no moment that under some circumstances, as a matter of law, a court is empowered to grant summary judgment. The vice of what occurred herein is that a serious factual dispute was alleged by the petitioners but they were unable to obtain a trial of these issues. Instead they were deprived of a substantial property interest without due process.

A copy of the record on appeal and the briefs in the Court of Appeals are submitted as a matter of course for this Court to peruse. The brief legal argument following indicates an important right under the Fourteenth Amendment has been denied to petitioners, namely, the right to a trial (due process of law) before property of theirs, in effect, is confiscated.*

REASONS FOR GRANTING CERTIORARI

POINT I

The Hotel Seville is virtually the sole asset of the corporate petitioner and is valued in terms of seven figures. The individual petitioners own two-thirds of the stock of the corporate petitioner and the ruling of the State Courts ordering the sale of the hotel without granting a trial to petitioners where they could present evidence and cross-examine witnesses in effect deprived them of property without due process of law, thus violating the Fourteenth Amendment.

As the record of the State court proceedings indicate, the Hotel Seville, virtually the sole asset of the Corporate petitioner, was ordered sold for what the individual peti-

* While petitioners will share in the proceeds of sale, they maintain that they are being forced to sell under a contract "created" by judicial decree. They maintain that the consideration is inadequate.

tioners claimed was an inadequate consideration, without ever granting a trial to Petitioners. The petitioners, that is the individual petitioners, are the president and secretary of the corporate Petitioner and own two-thirds of its stock.

The state court at *nisi prius* granted a motion for summary judgment. It is apparent from exhibits A, B, and C annexed to this Petition that the expiration clause of the agreement stated that it would occur in ten years. Since the original agreement was dated March 22, 1955, it is clear that an offer to purchase dated May 28, 1965 was over ten years later and there was no "contract" requiring a sale.

While there was an amendment to the March 22, 1955 agreement, namely in June 14, 1956, this by its own terms did not operate to extend the terms of the original contract. (See Exhibit B.)

The most important asset of the defendant corporation is the hotel it owns. This is a very valuable asset worth a sum of money in seven figures. The individual petitioners are employees of the corporation and would lose their jobs as well as the hotel if a sale is compelled.* Perhaps the factual issues which exist will enable them to keep the asset—perhaps not. But at the very least, they are entitled to a hearing where good faith, bona fides and so forth are involved. In *Bragg* v. *Weaver,* 251 U.S. 57, 59 (1919), a case not directly in point, but containing apt legal principles, the Supreme Court explained (id. at 59):

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* Query whether this would violate Article I, Section 10 of the United States Constitution—impairment of the obligation of contract.

> "But it is essential to due process that the mode of determining the compensation be such as to afford the owner an opportunity to be heard . . . carrying with it a right to have the matter determined on a *full trial. United States* v. *Jones,* 109 U.S. 513, 519 . . ." (Italics supplied.)

Without a trial of the factual issues, the defendants will be irreparably damaged, but there is no sound reason to suppose that the respondent will be equally prejudiced.

It has further been held that where a State has deprived a litigant of the opportunity of presenting evidence which is material, as occurred herein, Petitioners claim, then that litigant has been deprived of due process of law and a reversal of the judgment is required.

See *Saunders* v. *Shaw,* 244 U.S. 317 (1917).

Moreover, it is clear that the petitioners herein never waived any right to a hearing and trial as they consistently insisted thereon. (Cf. *Roller* v. *Holly,* 176 U.S. 398 [1900].)

The petitioners herein are of the firm belief that the sale of the hotel is contrary to the best interests of the stockholders and that the consideration therefor is inadequate. There are only three shareholders, viz: the individual petitioners and respondent, Kozlowski. Thus two-thirds of the stockholders, Margulies and Morgenstern, are against the sale, challenge its good faith and contend that the agreement requiring the sale expired. To omit to grant a trial on these issues also constitutes a denial of equal protection of the laws, in addition to a denial of due process.

The agreement (Exhibit A, Paragraph "I") required unanimous consent of the stockholders in any event to transact business and thus the sale seems void since no unanimous consent existed.

POINT II

The nisi prius court's unwarranted extension of the expiration date of the contract of March 22, 1955 constituted an unwarranted impairment of the obligation of contract contrary to Article I, Section 10 of the United States Constitution, especially since it also resulted in the virtual confiscation of property [the Hotel Seville].

The petitioners are aware that Article I, § 10 of the United States Constitution ordinarily is aimed at legislative acts which impair the obligation of contracts.

See *Home Bldg. & Loan Assoc.* v. *Blaisdell*, 290 U.S. 398 (1934).

On the other hand, where a Court acts to impose a contract different than made upon a signator thereof, then it is clear that a violation of this clause may occur. Thus a judgment granted in favor of a creditor for example is not a contract. [*Morley* v. *Lake Shore Railway Co.*, 146 U.S. 162 (1892); *New Orleans* v. *N. O. Water Works Co.*, 142 U.S. 79 (1891).]

More important however, it has been held that whether a particular agreement is a valid contract to begin with is a question for the Courts and ultimately for the Supreme Court of the United States to determine, especially when the protection of the "contract clause", Art. I, § 10, is invoked as herein. See *New Orleans* v. *N. O. Water Works Co.*, *supra*; *Zane* v. *Hamilton County*, 189 U.S. 370, 381.

Where a contract such as that herein is enforced contrary to its terms, then the obligations and remedies of the parties are also affected. The contract itself may now be re-

garded as at an end; but the injured party, nevertheless, has a new set of rights in its stead, those which are furnished him by the remedial law, including the law of procedure. Hence the further question arises, whether this remedial law is to be considered a part of the law supplying the obligation of contracts. Originally, the predominating opinion was negative, since this law does not really come into operation until the contract has been broken. Yet it is obvious that the sanction which this law lends to contracts is exeremely important—indeed, indispensable. In due course it became the accepted doctrine that that part of the law which supplies one party to a contract with a remedy if the other party does not live up to this agreement, as authoritatively interpreted, entered into the "obligation of contracts" in the constitutional sense of this term, and so might not be altered to the material weakening of existing contracts. In the Court's own words, "Nothing can be more material to the obligation than the means of enforcement. Without the remedy the contract may, indeed, in the sense of the law, be said not to exist, and its obligation to fall within the class of those moral and social duties which depend for their fulfillment wholly upon the will of the individual. The ideas of validity and remedy are inseparable * * *." *Von Hoffman* v. *Quincy*, 4 Wall. 535, 552 (1867). The Courts ought not to impose contracts never made.

The Court has held that "Every case must be determined upon its own circumstances . . . ." (*Von Hoffman* v. *Quincy*, *supra*).

That time works changes is a platitude requiring no discussion. The deprivation of any right or privilege, such as the ownership of property without due process is in direct

conflict with the broadening interpretation of the Constitution and 14th Amendment. (Cf. *Weems* v. *United States*, 217 U.S. 349, 373 (1910).

This Court also stated in *Weems, supra*, at 373, that:

> "Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils, but its general language should not, therefore, necessarily be confined to the form that evil had heretofore taken. Time works changes, bring into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions."

The petitioners herein have been deprived of a substantial interest in property involving millions of dollars without the state court ever affording them a trial where evidence could be offered and witnesses produced and examined. This Court should grant certiorari to review this deprivation of constitutional rights and give redress to the petitioners.

CONCLUSION

The petition for a writ of certiorari to the New York Court of Appeals should be granted.

Respectfully submitted,

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APPENDIX A

Constitutional and Statutory Provisions Involved

Article I, Section 10, United States Constitution:

> "No State Shall . . . pass any . . . Law impairing Obligation of Contracts. . . ."

Amendment 14, United States Constitution:

> ". . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."

Exhibit A

AGREEMENT, made this 22nd day of March 1955, by and between Seville Syndicate, Inc., a domestic corporation having its principal office at 22 East 29th Street, in the Borough of Manhattan, City and State of New York, hereinafter referred to as the Corporation, Moritz Kozlowski, residing at 2275 Barker Avenue, in the Borough of the Bronx, City and State of New York, hereinafter referred to as Kozlowski and Mundek Margulies, residing at 4415 Atlantic Avenue, in the Borough of Brooklyn, City and State of New York, hereinafter referred to as Margulies:

WITNESSETH:

WHEREAS, the individual parties hereto are the owners of all of the outstanding stock of the Corporation, and

WHEREAS, it is the desire of said individual parties to make provision for their protection as stockholders of the Corporation, and

WHEREAS, it is the intention of the parties hereto that said Corporation shall be and continue to remain a "Closed Corporation", and

WHEREAS, the stock in the aforesaid Corporation consists of one hundred (100) shares, non par value, and

WHEREAS, The Corporation has heretofore issued all of its common stock, 33⅓ shares to Kozlowski, and 66⅔ shares to Margulies,

Exhibit A

Now, Therefore, in consideration of the sum of One ($1.00) Dollar, each to the other in hand paid, the receipt whereof is hereby acknowledged, and in consideration of the mutual covenants, stipulations and conditions hereinafter set forth, It Is Agreed As Follows:

I.

It is agreed that the unanimous vote or consent of the holders of all of the shares of the common stock of this Corporation, issued and outstanding, shall be necessary for the transaction of any and all business at any and all meetings of the holders of such stock, and no action of the stockholders at any such meeting shall be valid or effective except upon such unanimous vote or consent, and it is agreed that no director shall hereafter be elected to any office of this Corporation except upon the unanimous vote of the holders of all of the shares of stock issued and outstanding. The provisions of this paragraph shall be effective for a period of ten years.

II.

A. It is agreed that Kozlowski and Margulies, as well as any person or persons to whom they or either of them shall transfer their stock in the Corporation, or any part thereof, will so vote the stock of the Corporation, as to bring about the following:

Exhibit A

1. The election and continuance of a Board of Directors of said Corporation, consisting of the following:

MORITZ KOZLOWSKI,
IDA KOZLOWSKI,
MUNDEK MARGULIES,
SIMA MARGULIES.

It is understood that Ida Kozlowski is the nominee of Kozlowski and that Sima Margulies is the nominee of Margulies. In the event any of said persons shall resign as a director, or in the event of his or her position on the Board of Directors becoming vacant for any other cause or reason, his or her successor shall be selected and nominated (a) by the holder or holders at the time such vacancy shall occur of the stock presently being issued to Kozlowski, if such vacancy shall be of the place on the Board held by Moritz Kozlowski or Ida Kozlowski, or their respective successors; and (b) by the holder or holders at the time such vacancy shall occur, of the stock presently being issued to Margulies, if such vacancy shall be of the place of the Board held by Mundek Margulies or Sima Margulies, or their respective successors.

2. All directors of this Corporation are required to be present at any meeting of the directors in order to constitute a quorum for the transaction of any and all business of the Corporation, and the unanimous vote of all directors of this Corporation shall be necessary for the transaction of any and all business at meetings of the directors, except that a lesser number may adjourn a meeting for lack of a quorum. The provisions of this paragraph shall be effective for a period of ten years.

Exhibit A

3. The adoption and continuation of by-laws of the Corporation which shall, in addition to the provisions usually contained in such by-laws, also contain:

(a) A provision requiring that all checks, drafts, notes, orders for the payment of money, acceptances, and other like instruments of the Corporation be signed by its President and countersigned by its Treasurer.

(b) Such other provisions as shall be necessary or required to effectuate and carry out the purpose and intention of this agreement and of the parties hereto that there shall at all times be equality of control of the Corporation, as between Kozlowski, and any person or persons to whom he may transfer all or any part of his stock pursuant to the provisions of this agreement, on the one hand, and Margulies and any person or persons to whom he may transfer all or any part of his stock pursuant to the provisions of this agreement, on the other hand.

B. The parties agree that the following shall be elected and continued as officers of the Corporation:

PRESIDENT—MUNDEK MARGULIES
SECRETARY—MORITZ KOZLOWSKI
TREASURER—MORITZ KOZLOWSKI

In the event either of said persons shall resign or in the event his office shall become vacant for any other cause or reason, his successor shall be a person (1) designated

by the holder or holders at the time such vacancy shall occur, of the stock presently being issued to Margulies, if such office shall be that of President, and (2) designated by the holder or holders at the time such vacancy shall occur, of the stock presently being issued to Kozlowski, if such office shall be that of Secretary or Treasurer.

III.

A. The Corporation agrees to and does hereby employ Kozlowski and Margulies, respectively, and Kozlowski and Margulies, respectively agree to work for the Corporation, at a salary to be hereafter mutually agreed upon by Kozlowski and Margulies. Said salaries shall be for all services rendered to the Corporation by said parties whether as officer, director, employee, or in any other capacity whatever.

B. Such employment of Kozlowski and Margulies respectively shall continue so long as Kozlowski and Margulies continue as a stockholder of the Corporation and performs the duties and functions of his employment.

IV.

A. The individual parties hereto agree that neither of them will sell, transfer, encumber, pledge or otherwise dispose of his stock in the Corporation, or any part thereof, unless the party desiring to do so (in this paragraph referred to as the "retiring stockholder"), shall

first give to the other party (in this paragraph referred to as the "remaining stockholder"), an option to purchase all of his stock in the Corporation, as hereinafter provided.

B. Such option to purchase shall be given by sending to the remaining stockholder a notice in writing, stating in substance that the retiring stockholder offers to sell all of his shares to the remaining stockholder, and the price asked for such stock. The remaining stockholder shall then have a period of thirty (30) days from the date of the sending of such notice to accept the offer of the retiring stockholder, as made. In the event, however, the remaining stockholder shall desire to purchase the stock of the retiring stockholder, but shall not agree to or with the price stated in the notice to sell, the remaining stockholder shall within such thirty-day period, send to the retiring stockholder a notice in writing, stating in substance that he agrees to purchase the stock in question, that he does not agree to the price asked and desires to have the same fixed by appraisal, and that he will purchase the stock at the price so fixed by appraisal. Thereupon, the matter is to be submitted to appraisers for the purpose of determining the value of the stock to be sold, said appraisers to be elected and to make their appraisal in the manner provided for arbitrators in Paragraph VI of this agreement. In determining the price of the stock in question, the appraisers will ascertain the fair value of the Corporation as a going business, including but not by way of limitation good will value, if any, and shall base the price thereon.

Exhibit A

C. It is agreed that in the event of Kozlowski's death, unless the stock of the Corporation owned by him passes to Ida Kozlowski, by inheritance or legacy, or in the event of Margulies' death unless the stock of the Corporation owned by him passes to Sima Margulies by inheritance or legacy, the survivor of Kozlowski and Margulies shall have an option to purchase the stock of the deceased stockholder. Such option shall be the same as the option provided for in sub-paragraph B hereof (the deceased stockholder, his personal representatives of his estate being considered as occupying the position of the "retiring stockholder"), except that the thirty (30) day period for exercising the option shall not commence to run until the surviving stockholder shall have been given notice of the appointment of such personal representative, or if no personal representative is appointed, until the expiration of three (3) months from the date of death. All of the other provisions of sub-paragraph B hereof as well as of the other subparagraphs hereof, shall be applicable to said option and the exercise thereof (the deceased stockholder, his personal representative of his estate being considered as occupying the position of the "retiring stockholder"), with the same force and effect as in the case of an inter vivos transaction.

D. The sale of the retiring stockholder's stock shall take place and be consummated at the office of the Corporation, within five (5) days after the acceptance of the offer or within five (5) days after the appraisers' determination of the price, as the case may be; and at such time, the purchaser shall pay the price in cash, and the

stock shall be transferred. The retiring stockholder shall furnish and pay for the necessary Federal and State Transfer stamps, shall furnish all endorsements of stock powers necessary to transfer the stock in question and shall further furnish all resignations of officers and directors necessary to vest in the purchaser the stock being transferred. The expenses of any appraisal shall be borne equally between the retiring stockholder and the remaining stockholder.

E. Anything herein contained to the contrary notwithstanding, no transfer of all or any part of the stock of the Corporation by Kozlowski to Ida Koslowski or by Margulies to Sima Margulies, Chaskel Morgenstern and his wife Irene Morgenstern, shall be considered a sale, transfer, pledge or disposition of stock, which as a prerequisite requires the giving of an option, the intention of the parties being that Kozlowski and Ida Koslowski shall be free to transfer or retransfer stock between them and that Margulies, Sima Margulies, Chaskel Morgenstern and Irene Morgenstern shall be free to transfer or retransfer stock between them, provided, however, that except for the privilege of retransfer by Ida Kozlowski to Kozlowski and by Chaskel Morgenstern, Irene Morgenstern and Sima Margulies to Margulies, said Ida Kozlowski and Sima Margulies, Chaskel Morgenstern and Irene Morgenstern, as the case may be, shall hold any stock of the Corporation which they may respectively acquire, subject to all of the terms and provisions of this agreement, whether contained in this Paragraph IV, or otherwise, in the same manner and to the same extent as though said

Exhibit A

Ida Kozlowski and Sima Margulies, Chaskel Morgenstern and Irene Morgenstern were named as parties to this agreement.

F. It is agreed that no offer of stock shall be considered as satisfying the provisions hereof, unless the offer shall be of all of the stock owned by the retiring stockholder as well as by any person or persons to whom he shall have transferred any part of the stock at any time issued to him by the Corporation.

G. It is agreed that if the remaining stockholder does not desire to avail himself of the options, and rights herein provided for, or if, having availed himself of such options and rights, does not complete the purchase of the stock, the retiring stockholder shall be free to sell, transfer, pledge or otherwise dispose of his stock without restriction or hindrance of any kind; provided, however, that the retiring stockholder has first fully complied with all of the foregoing terms and provisions and provided further that any such transfer on the part of the retiring stockholder takes place within three (3) months after the expiration of the thirty (30) day option period or the failure of the remaining stockholder to complete the purchase of said stock.

V.

There shall be written, typewritten or printed on the face of each certificate of stock of the Corporation, the following statement:

Exhibit A

"This certificate of stock has been issued and is held subject to the terms and provisions of an agreement dated the day of , 1955, made by and between SEVILLE SYNDICATE INC., MORITZ KOZLOWSKI and MUNDEK MARGULIES, a duplicate original of which is filed with the Secretary of the Corporation and is transferable only in accordance with said agreement".

VI.

In case of any controversy, claim or dispute between the parties hereto, of whatsoever nature, relating to this agreement or the breach thereof, the same shall be submitted, settled and determined by arbitration as follows:

Upon the arising of any such dispute, controversy or claim, either party shall send to the other a written notice, designating an arbitrator and stating the matter or matters involved in such dispute, controversy or claim. Within five (5) days thereafter, the party so notified shall designate a second arbitrator, sending to the other party a written notice of such designation as well as a statement of any further controversy, claim or dispute, if any, which is to be arbitrated. The two arbitrators so nominated shall meet within five (5) days after designation of the second arbitrator and shall select a third arbitrator or, if they shall not agree upon a third arbitrator prior to the expiration of such last mentioned five (5) day period, then such third arbitrator shall be selected by application to the American Arbitration Association. In the event either of the parties hereto shall fail to

nominate an arbitrator in the manner herein provided for, the vacancy caused thereby shall be filled by application to the American Arbitration Association, and in such event, the arbitrator designated by one of the parties and the arbitrator designated by the American Arbitration Association shall select a third arbitrator within five (5) days after the designation of such second arbitrator, or if they cannot agree upon a third person within such five (5) day period, then this vacancy shall be filled by a second designee of the American Arbitration Association. The three arbitrators chosen as above, shall constitute a Board of Arbitration and shall proceed to determine as expeditiously as possible the matter or matters in question as outlined and stated in the above mentioned notices. The award of said arbitrators shall include the fixing of the expense of said arbitration and the assessment of the same against either or both parties. Except as herein otherwise provided, the arbitrators shall follow and be governed by the law of the State of New York and the rules and regulations of the American Arbitration Association and their finding, determination and award shall be final and binding upon the parties.

VII.

The attachment of the interest of any party in the Corporation assets by a judgment creditor or by any other person claiming a lien thereon, or the filing of a petition in bankruptcy, either voluntary or involuntary, by or against a stockholder, or the appointment of a receiver in any bankruptcy proceeding by or against a

stockholder, or the use of any insolvency acts by any stockholder which affects his corporate interest, shall constitute an offer to sell his interest to the remaining stockholder, as if any offer in writing had been made by such stockholder as of the date of such attachment, filing of lien, adjudication in bankruptcy, filing of voluntary or involuntry petition, etc., unless the attachment, lien, bankruptcy proceeding, etc., shall have been discharged, bonded, vacated and/or fully satisfied within thirty days from such date. Such offer shall remain open for acceptance for a period of thirty days from the expiration of this thirty day period.

VIII.

This agreement contains the complete agreement between the parties and no waiver or modification of this agreement shall be valid unless executed in writing with the same formalities as this instrument. No waiver of any breach or of any provision of the agreement shall be construed a waiver or any subsequent breach thereof or of any other provision, whether of the same or different nature.

IX.

The individual parties hereto hereby agree to vote their stock in the Corporation so as to effectuate and carry out all of the provisions of this agreement and to bring about the ratification thereof by the Corporation and they do further agree to execute any and all papers and documents required or necessary to effectuate and carry out all of the provisions of this agreement.

Exhibit A

X.

It is understood and agreed that the Corporation shall be entitled to an injunction to be issued by any competent court of equity enjoining and restraining any party hereto and each and every other person, firm and corporation from any and all acts, whether of omission or commission, which may violate or breach the covenants contained in this agreement; provided, however, that nothing herein contained shall be construed or deemed as affecting or limiting any other rights or remedies which any of the parties hereto may have by reason of the violation or breach of any of the other terms and provisions of this agreement.

XI.

All notices required to be sent under and pursuant to the terms of this agreement shall be in writing and shall be sent by registered mail addressed to the party or parties to whom such notice is required to be sent at his residence address appearing on the stock record book of the Corporation. All such notices shall be deemed effective as of the date upon which they shall be mailed, regardless of the date or receipt.

Exhibit A

XII.

This agreement shall extend to and be binding upon the heirs, executors, administrators and legal representatives, successors and assigns of the respective parties hereto.

In Witness Whereof, the parties hereto have hereunto set their hands and seals the day and year first written.

Seville Syndicate Inc.

By .....
Pres.

.....

.....

Exhibit B

AGREEMENT made this 14 day of June, 1956, by and among SEVILLE SYNDICATE INC., MORITZ KOZLOWSKI, MUNDEK MARGULIES and CHASKEL MORGENSTERN.

WITNESSETH:

WHEREAS, the first three parties hereto, have entered into an agreement dated March 22nd, 1955, and

WHEREAS, the parties hereto are desirous of amending said agreement to the extent hereinafter referred to only,

NOW, THEREFORE, it is agreed as follows:

1. Paragraph "II, A, 1" is hereby amended so as to delete therefrom the name of Sima Margulies, and insert therein the name of Chaskel Morgenstern, and further to delete therefrom the statement: "that Sima Margulies is the nominee of Margulies".

2. Paragraph "III, A and III, B" is hereby amended to include Chaskel Morgenstern.

3. It is further agreed that the salaries of Moritz Kozlowski, Mundek Margulies and Chaskel Morgenstern shall be in equal terms.

4. Paragraph "IV, subdivisions A, B, C, D, E and G" are hereby deleted, and in place thereof, the following shall be provided.

"None of the parties hereto shall have the right to sell his stock in the corporation, without the written consent

of the others. However, in the event any of the parties desire that the hotel business and the premises thereof should be sold, the other parties agree that the same shall be sold, provided a written bona fide offer, with 1% deposit be procured, and the said bona fide offer is at least in the sum of $1,000,000.00 inclusive of any mortgage, with at least $200,000.00 cash and balance in a purchase money mortgage; said mortgage shall provide for at least 8% for interest and amortization for a term not more than 10 years. The offer shall be exclusive of brokers fees. Such party desiring to sell and receiving such offer, shall give the other parties notice by registered or certified mail of said offer, and the other parties, within 30 days of the mailing of such registered or certified notice, shall have the right to procure a higher bona fide offer and deposit of 1%. In such event, the property must be sold to the higher bidder. The prospective purchaser shall also purchase the premises subject to any unpaid balances due for the elevator installations, for refrigerators or appliances installed in the premises, or any furniture and fixtures that may be purchased on time payment, and to any conditional sales or chattel mortgages."

5. In the event of a sale, pursuant to the terms of paragraph "4" hereof, none of the parties hereto, members of their families or associates, shall in any wise, directly or indirectly, be the purchaser of said premises or any part thereof, or of the stock in any purchasing corporation or any part thereof. In the event any of the parties, members of his family or associates, shall directly or

indirectly be the purchaser of said premises or any part thereof, or purchase any stock in the owning corporation or any part thereof, said party or parties shall be liable to the other party for damages in the sum of $100,000.00 each. This sum is fixed inasmuch as it is impossible to determine the actual damages sustained by reason of the breach of this covenant in the agreement. The parties hereto, members of their families or associates, cannot lease said hotel from the purchaser of said property, and in the event this clause is breached, the damages set forth above shall be paid by the parties so breaching this covenant.

6. In the event of sale of said hotel business, the purchaser must warrant in the Contract of Sale that the purchaser, his assigns, successors or his heirs, are bona fide purchasers, and are in no manner connected with the parties herein, their families or associates; shall in any wise, directly or indirectly be a purchaser for them of said premises or any part thereof, or that the parties, their families or associates own or possess stock of the purchasing corporation. That the purchaser will accept a deed of said premises with a covenant restricting the purchaser, his assigns, successors or his heirs from conveying said property or part thereof to the parties herein, their families or associates; the contract of sale shall survive the conveyance of a deed to said premises. Further, should the purchaser, his assigns, successors or heirs sell or lease or turnover the said premises or parts thereof, or issue stock of the purchasing corporation to the party or parties herein, the purchser agrees that he

is liable to the aggrieved party or parties for damages in the sum of $100,000.00 each. This sum is fixed inasmuch as it is impossible to determine the actual damage sustained by reason of said breach.

7. Paragraph "VI" is hereby deleted from the agreement.

8. Each of the parties do hereby affirm that the following shares of stock of the corporation have been purchased for the following sums of money:

Mundek Margulies has purchased 33⅓ shares of common stock for the sum of $15,000.00.

Moritz Kozlowski has purchased 33⅓ shares of common stock for the sum of $15,000.00.

Chaskel Morgenstern has purchased 33⅓ shares of common stock for the sum of $15,000.00.

9. Each of the parties hereto hereby affirms that loans to the corporation have been made as follows:

Mundek Margulies has loaned the corporation the sum of $45,000.00.

Moritz Kozlowski has loaned the corporation the sum of $45,000.00.

Chaskel Morgenstern has loaned the corporation the sum of $45,000.00.

Said loans shall be payable with interest at 6% and be due five years from date hereof, as evidenced by promissory notes executed by the corporation, by its president and treasurer. There shall be no priority of payments

to any of the parties hereto, and said notes shall be non-negotiable, except that the Board of Directors may pre-pay said notes or any part thereof, without affecting the due date thereof.

10. In the event any of the parties shall die, the representative of his estate shall be entitled to transfer his stockholdings to the surviving spouse, who shall be entitled to all of the rights hereunder, herein due her deceased husband, and she shall assume all of the terms and obligations of this contract as though she were an original party thereto. It is further understood and agreed that the parties hereto will incorporate the foregoing in a Last Will and Testament.

11. The parties hereto agree, as officers, stockholders and directors of the corporation, to use their best efforts to obtain a new first mortgage in the sum due at the time of the refinancing of said first mortgage with an annual interest rate of 5% and an overall constant payment of 8%. Should the corporation be unable to procure said new mortgage on or before August 1st, 1956, the parties hereto agree that the present first mortgage shall be extended in the sum then due at the time of the extension, payable at the annual interest rate of 5% and $20,000.00 a year amortization, for a term of ten years.

12. In the event any of the parties hereto shall fail to comply with paragraph "11", this agreement shall be rendered null and void and of no effect.

Exhibit B

13. Paragraph "V" shall be amended so as to add to the legend on each certificate of stock, the date of this agreement.

14. The by-laws of this corporation and if necessary, the certificate of incorporation, shall be amended to incorporate the foregoing provisions.

In Witness Whereof, the parties hereto have hereunto set their hands and seals the day and year first above written.

Seville Syndicate, Inc.
by Mundek Margulies, Pres.
Mundek Margulies
Moritz Kozlowski
Chaskel Morgenstern

Exhibit C

May 28, 1965

Seville Syndicate, Inc.
22 East 29th Street
New York, New York

Attention: Mr. Moritz Kozlowski, Secretary

Gentlemen:

The undersigned hereby offers to purchase from you the Hotel Seville, located at premises 22 East 29th Street, New York, New York, together with premises 86-88 Madison Avenue, New York, New York, for a purchase price of $2,000,000.00, all as provided in the Contract of Sale dated as of May 28, 1965, between you, as Seller and the undersigned as Purchaser, two copies of which, executed and acknowledged by the undersigned, are annexed hereto and made part hereof.

This offer to purchase is and shall be irrevocable for a period of forty (40) days from the date hereof. If it is not accepted prior to the expiration of such forty (40) day period in the manner for acceptance hereinafter provided, then it shall be and be deemed to be a continuing offer by the undersigned to purchase said property, subject to its withdrawal by the undersigned at any time prior to its acceptance (in the manner hereinafter provided) by written notice of such withdrawal given by the undersigned to you by registered or certified mail, addressed to you at 22 East 29th Street, New York, New York, and upon such withdrawal this offer to purchase and said Con-

tract of Sale shall be considered null and void and of no further force and effect. Such notice of withdrawal shall be deemed given when mailed.

This offer to purchase shall be accepted by you by the hand delivery by you to the undersigned, c/o David Berg, Esq., Suite 5820, 350 Fifth Avenue, New York, New York, of one of the annexed copies of said Contract of Sale duly executed and acknowledged on your behalf by the proper officer or officers of your corporation.

In accordance with the provisions of paragraph (a) of Rider 1, of said Contract of Sale, a check of the undersigned drawn to the order of McCarthy & Nathanson, Escrow Agent, in the sum of $20,000.00 is herewith delivered to McCarthy & Nathanson. By joining in the execution of this letter at the foot thereof, McCarthy & Nathanson hereby agree to hold the proceeds of said check in escrow and to disburse them only as follows:

1. Upon the receipt by the undersigned, prior to the withdrawal of this offer to purchase, of a copy of said Contract of Sale duly executed and acknowledged on your behalf by the proper officer or officers of your corporation, the said sum of $20,000.00 held in escrow by said Escrow Agent promptly shall be delivered to you;

2. If said offer to purchase is withdrawn by the undersigned prior to its acceptance by you, then said Escrow Agent promptly shall return to the undersigned said sum of $20,000.00.

Exhibit C

It is expressly understood that the sole responsibility of said Escrow Agent, shall be to receive said check and hold the proceeds thereof in escrow pursuant to the provisions of this letter and that they shall have no responsibility or liability to you or the undersigned arising from any act or failure to act on their part, except for their own wilful misconduct.

Very truly yours,

BERNARD SILLINS
Bernard Sillins

The undersigned, MCCARTHY & NATHANSON, hereby accept the foregoing escrow, acknowledge the receipt by them of the $20,000.00 check referred to and agree to hold the proceeds of same in escrow pursuant to the provisions of the foregoing letter offer to purchase.

Dated: May 28, 1965

MCCARTHY & NATHANSON
By MAURICE J. MCCARTHY, JR.
Partner

The undersigned, Moritz Kozlowski, Secretary of Seville Syndicate, Inc., hereby acknowledges the receipt this day on behalf of said corporation of the foregoing letter offer to purchase and copies of Contract of Sale annexed thereto.

Dated: May 28, 1965

MORITZ KOZLOWSKI
Moritz Kozlowski